STATE OF MICHIGAN

COURT OF APPEALS

CMC TELECOM, INC., Plaintiff-Appellant,	UNPUBLISHED September 23, 2014
v	No. 315338 Oakland Circuit Court
NEYER TISEO & HINDO, LTD d/b/a NTH CONSULTANTS, LTD, Defendant-Appellee.	LC No. 2012-125166-CK

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

In this breach of contract action, plaintiff alleges that defendant is liable for over $200,000 in charges in connection with 17,000 fraudulent international calls. The lower court granted defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse.

Plaintiff provided telecommunications services to defendant. Plaintiff and defendant are both Michigan corporations. Plaintiff is a local telephone provider who purchases long distance and international phone service from Level 3, a wholesaler,[1] and resells these services to their customers. The parties executed the CMC Telecom, Inc. Service Terms and Conditions on May 22, 2008 ("Service Terms"). The Service Terms specified a 36-month term and included one dedicated point-to-point CAS T-1. The Service Terms provide that "Customer agrees to contract services ('Services') referenced on the CMC Telecom, Inc. ('CMC') Customer Service Order ('CSO')," is required to pay for services, and that "[a]ll applicable tariffs are fully incorporated herein." Plaintiff disclaims certain liabilities, including that they "shall not be liable for any losses or damages resulting from . . . use or misuse of an account, equipment, or service." However, the contract also states that in "no event shall either party be liable for . . . damages for the loss of data, goodwill or profits, savings or revenue, or harm to business." Regarding additional services, the agreement states "additional terms and tariffs may be modified," including "particular services Customer chooses now or may choose in the future." Additionally, "if Customer uses the Services, Customer is deemed to have accepted the terms

[1] Level 3 is not a party to this suit.

and conditions and applicable tariffs." The agreement is integrated. The parties also executed a 12-month, dedicated point-to-point services contract on June 1, 2010.

Plaintiff filed a complaint alleging breach of contract for failure to pay the amount owed, and seeking recovery upon an account stated, pursuant to MCL 600.2145. Plaintiff alleged that defendant's phone lines incurred "a large amount of international call activity" between March 5, 2011 and March 8, 2011, resulting in a $224,028.61 balance owed. Plaintiff later sought to amend the complaint to reflect payments from defendant for the undisputed portion of the bill, which would reduce the amount owed to $209,993.38. Total call activity reached 17,000 and the parties do not dispute that the calls were fraudulently placed.

Defendant sought summary disposition under MCR 2.116(C)(4) (subject matter jurisdiction), (8) (failure to state a claim on which relief can be granted), and (10) (no genuine issue of material fact). The court specifically found that there was no contract for international telephone service, that there was no course of dealing regarding fraudulent international calls, and that plaintiff failed to show any damages. Therefore, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) and denied the other motions pending before the court. Plaintiff now appeals. A court's ruling on a motion for summary disposition is reviewed de novo, *Dunn v Bennett*, 303 Mich App 767, 770; 846 NW2d 75 (2013), as are issues involving "[t]he existence and interpretation of a contract," *id*. at 774.

MCR 2.116(C)(10) provides that where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, . . . the moving party is entitled to judgment or partial judgment as a matter of law." Because such a motion "tests the factual sufficiency of the complaint," it is proper to consider the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), [albeit] in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). If the nonmovant's evidence "fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. at 120. Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). When giving the benefit of reasonable doubt to the opposing party, if an issue upon which reasonable minds might differ is evident, a genuine issue of material fact exists. *Id*.

The words and language of a contract are given their plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The goal of the interpretation of a contract is to determine and effectuate the intent of the parties. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law," and is enforced as written. *Id*. Interpretation must avoid a construction that "would render any portion of the contract nugatory." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). Whether a given clause applies to a set of facts is conducted by a straightforward analysis of the facts and contract terms. *Id*.

In asserting a breach of contract, plaintiff "must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Id.* at 178. Four essential elements are required in a valid contract: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). Here the parties do not dispute that a contract was formed. The dispute is over whether the contract covered international calls and, if so, which party bore the burden for fraudulent calling activity.

Defendant does not contest that it was billed for normal usage over the service lines provided by plaintiff. Plaintiff argues that ¶ C of the Service Terms also contemplates an international calling component of the services. In relevant part, that paragraph provides that "rates for service shall be set forth in the CSO and shall be valid for the Initial Term, provided, however, all rates for international Services are subject to change on five (5) days notice" from plaintiff. Looking to the CSO, no usage rates are specified for any type of service whether local, national, or international. In its motion to amend the complaint, plaintiff provided an additional "Contract Renewal Form," dated May 22, 2008, which does reflect a special rate plan for Local, IntraLata, IntraState, and InterState usage "for CAS T-1." Defendant notes that this rate sheet does not reference international rates and argues that the contract therefore did not contemplate international service. The Contract Renewal Form, while bearing the names of both the salesperson and the customer, is not executed by either party. Further, the rate sheet, although dated contemporaneously with the Service Terms, is not the CSO, which sets forth the costs for the CAS T-1 lines. And the form is not referenced in the first two pages of the Service Terms, the CSO, or the 2010 Agreement. Thus, it does not appear to be a part of the agreement.

Plaintiff presented affidavit and record evidence that defendant engaged in international calling under the contract between the parties. At this stage of the proceedings, the evidence presented must include admissible content, but need not be in admissible form. *Maiden*, 461 Mich at 124 n 6. Nonetheless, it is plausible that the international calling records would be admissible under the business record exception, MRE 803(6), and Rhoni Hamel's affidavit would be available by means of testimony, *id.* Therefore, plaintiff properly rebutted defendant's motion with affidavit and documentary evidence, as required to survive a motion for summary disposition, and created a question of material fact on the existence of international calling coverage under the contract.

Additionally, the parties' conduct presents an independent basis on which to deny summary disposition because it arguably represents a course of performance.[2] Course of

[2] Throughout their briefs the parties refer to the legitimate international calls as a "course of dealing." A course of performance is distinct from a course of dealing, which "is a sequence of conduct concerning *previous transactions* between the parties to a particular transaction." MCL 440.1303(2) (emphasis added). Because the conduct occurred contemporaneous to the contractual term and was not conducted under a previous contract between the parties, it does not constitute a course of dealing.

performance is a well recognized doctrine within the sale-of-goods context. MCL 440.1303(1). Under the Michigan Uniform Commercial Code, course of performance is defined as

> a sequence of conduct between the parties to a particular transaction that exists if both of the following are met:
>
> (a) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party.
>
> (b) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection. [*Id*.]

Course of performance is also well recognized rule at common law and thus applicable in service contract situations. See Restatement Contracts, 2d, §§ 34, 209 comment a. Indeed, the Restatement indicates that an integrated writing "may be explained or supplemented by operative usages of trade, by the course of dealing between the parties, and by the course of performance of the agreement." Restatement Contracts, 2d, § 209, comment a. A course of performance is generally considered highly persuasive evidence of proper contract interpretation when introduced against the party so performing. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 191; 565 NW2d 887 (1997).

Additionally, our Supreme Court has recognized that a contract may

> "be modified, and strict performance thereunder waived or abrogated by the parties, without violating the rule against the admission of evidence to alter, vary, or contradict a written agreement. The rule relates to an attack upon the writing itself, and has no reference to the right of the parties to change the method or manner of performance, or waive rights or remedies thereunder by parol. . . ." [*Turner v Williams*, 311 Mich 563, 566; 19 NW2d 100 (1945), quoting *Jacob v Cummings*, 213 Mich 373, 378; 182 NW 115 (1921); see also *Quality Prods*, 469 Mich at 370-372.]

Even where the parties stipulate that modification to an agreement may be made only in writing, "a modification or waiver can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract" because "the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed." *Quality Prods*, 469 Mich at 372. Whether the parties agreed "to modify the contract can be deduced from their course of conduct if it is unequivocal and the terms of modification are definite, certain, and intentional." *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 345; 551 NW2d 349 (1996).

Here, the conduct of the parties evidences a course of performance which either provides additional interpretative guidance regarding ¶ C of the Service Terms, or could be understood to create a supplemental agreement between the parties to modify the Service Terms to include international calling features. Each month plaintiff offered the telecommunications services and defendant tendered payment for those services. At certain times the services provided included international telecommunications. Therefore, there exists "repeated occasions for performance

by" both parties. MCL 440.1303(1)(a). And each party had knowledge of the additional performance, i.e., defendant placed and paid for previous international calls and plaintiff connected those calls in expectation of payment, and had the opportunity to object. MCL 440.1303(1)(b). There is no accusation that all prior international calls were unintentional or fraudulent, nor is it possible for such conduct to be equivocal. Further, such conduct is definite and certain because it is confirmed on the monthly bill with specific date, time, and duration markers.

Finally, defendant argues that plaintiff has not sustained any damages because it has not paid the bill issued by Level 3. An injured party may recover only those damages which are the direct, natural and proximate result of the breach of contract. *Matter of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 401; 389 NW2d 99 (1986). Damages must be proven with reasonable certainty by the party asserting the breach, *id.*, and an invoice from a third party is proof of damages, *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495, 505; 190 NW2d 275 (1971).

Level 3 issued an invoice to plaintiff, which represents an obligation due, evidencing the damages sustained to survive a motion for summary disposition. Additionally, plaintiff submitted an affidavit of damages in support of its claim for account stated. Our Supreme Court has recognized that claims may accrue for breach of contract before any damages have been billed. *Miller-Davis Co*, 495 Mich at 182 (discussing accrual under an indemnity provision when nonconforming work was discovered, when indemnified party settled with damaged party, or when defective work was certified as repaired). Although the *Miller-Davis* Court declined to determine the exact date of accrual, of the three situations considered by the Court, only one would have included expended labor and materials to correct the nonconforming work, while in the other two situations the existence of nonconforming work would be sufficient to show damages with reasonable certainty. *Id.* In the case at hand, testimony and a documentary invoice can create the reasonable certainty required to prove damages without plaintiff having actually paid those amounts. Although the amount of damages is a matter that ultimately remains for the trier of fact, plaintiff here has submitted sufficient evidence of damages from defendant's breach to survive summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot